IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 696 of 1988

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

and

HON'BLE MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes. @em nts? Yes. @ements? Yes. @ements? Yes. @ements? Y s. @ements? Yes. @emen s? Yes. @ements? Yes. @ements? Yes. @ements? Yes @ements? Yes. @ements Yes. @ements? Yes. @ements? Yes. @ements? Yes. @ements? Yes. @ements? Yes. @ements? Yes. @ements? Yes. @ements? Yes. @ements? Yes. @ements? Yes. @ements? Yes. @ements? Yes.
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2. To be referred to the Reporter or not? ..Yes.
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3. Whether Their Lordships wish to see the fair copy of the judgement? .. No.
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4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India,1950 of any Order made thereunder?..No

5. Whether it is to be circulated to the Civil Judge? ... No.

HINABEN HARIBHAI

Versus

STATE OF GUJARAT

Appearance:

MR K J SHETHNA for the Appellant.

MR M A BUKHARI, APP, for the Respondent.

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 21/08/96

ORAL JUDGEMENT (per KADRI, J.)

The appellant has filed this appeal under S.374(2) of the Code of Criminal Procedure, 1973, challenging legality and validity of judgment and order dated July 19, 1988, passed by the learned Addl. Sessions Judge, Surat in Sessions Case No.137 of 1987 whereby she is convicted under Ss. 302, 307 and 309 of the I.P.Code and sentenced to R.I. for life for the offence under S.302 of the I.P.Code. The learned Addl. Sessions Judge has not imposed any sentence on the appellant under Ss.307 and 309 of the I.P.Code. Brief facts as unfolded at the trial are as under:

2. The appellant who was married with PW 10 Harishbhai Maganbhai Patel was residing at Ichhapore, Surat. Out of the wedlock she had one son Sandip and one daughter Bhavna. It is alleged that the husband of the appellant did not like her. She was therefore, harassed, beaten, ill-treated and subjected to cruelty by her in-laws. In a fit of disappointment and annoyance she tried to commit suicide on 7.6.1987 at about 10.15 a.m. with her two children. It is alleged that with the intent to cause death of her son and daughter, she threw away her daughter Bhavna in river Tapi and thereafter, alongwith her son Sandip jumped in the river so as to commit suicide. At the relevant time, the personnel of the Fire Brigade of Surat Municipal Corporation were searching dead body of another person in river Tapi. The personnel of the Fire Brigade noticed the appellant jumping in the river and rescued her and her son Sandip. Fire Brigade Sub-Officer Mr.Ishwarbhai Narsingbhai Patel caught hold of the appellant and her son Sandip and brought them out of the water. Mud and water which had entered into the mouth of the appellant and her

son were drained out by the personnel of the Fire Brigade and the appellant and her son were sent for medical treatment to Maskati Hospital, Surat. Police Constable Abhesinh Balubhai who was on duty at the Maskati Hospital, sent a message to the Rander Police Station about the incident and an offence was registered against the appellant under Ss.309 and 307 of the I.P.Code. On 9.6.l987, dead body of Bhavna was found from river Tapi. Police Inspector Mr.Jadeja, of Rander Police Station, who was in charge of the investigation held inquest on the dead body of Bhavna and sent it for post mortem examination to the New Civil Hospital, Surat. P.I.Mr.Jadeja prepared the panchnama of the scene of offence and recorded statement of the appellant. Yadi was sent to the Executive Magistrate to record the dying declaration of the appellant. In the meantime, Dy.Supdt. of Police Mr.Antani took over the investigation and recorded statement of the witnesses. On receipt of the yadi, Executive Magistrate Mr.Rameshchandra Pranshanker Joshi reached Maskati Hospital and recorded the dying declaration of the appellant. P.I. Mr.Jadeja, who was in charge of the investigation got prepared the map of the scene of offence and obtained the certificate indicating injuries sustained by the appellant. After completing investigation, P.I. Mr.Jadeja submitted charge-sheet against the appellant under S.302, 307 and 309 of the I.P.Code, in the court of the learned Chief Judicial Magistrate, Surat. As the offences under Ss.302, and 307 are exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Sessions Court, Surat for trial.

3. The above case was numbered as Sessions Case No.137 of 1987 in the Court of the learned Addl. Sessions Judge, Surat. Charge Ex.2 was framed against the appellant under Ss.302, 307 and 309 of the I.P.Code. The charge was read over and explained to the appellant, who pleaded not guilty to the charge and claimed to be tried.

4. In order to prove the charges against the appellant, the prosecution examined following witnesses :

1. PW 1 Ex. 7 Dr.Gordhanbhai Arjanbhai,
2. PW 2 Ex. 9 Dr.Pravinsinh Badalsinh,
3. PW 3 Ex. 10 Dr.Kusumben Bhagubhai Patel,
4. PW 4 Ex. 12 Jayantibhai Maganbhai Patel,
5. PW 5 Ex. 13 Ishwarbhai Gurjibhai Patel,

6. PW 6 Ex. 14 Sureshbhai Dagadu,
7. PW 7 Ex. 15 Premvadan Chhaganlal,
8. PW 8 Ex. 16 Pravin Ramji,
9. PW 9 Ex. 17 Balu Kuberdas,
10. PW 10 Ex. 18 Harishbhai Maganbhai Patel,
11. PW 11 Ex. 19 Police Constable Abhesinh
12. PW 12 Ex. 20 Head Constable Divan Bhilabhai,
13. PW 13 Ex. 25 Ishwarbhai Narsinhbhai Patel,
14. PW 14 Ex. 26 Rameshchandra Pranshanker Joshi
15. PW 15 Ex. 27 PI Pravinsinh Banesinh Jadeja,
16. PW 16 Ex. 29 Dy.SP Manojkumar Antani.

The prosecution in support of its case also relied on documentary evidence consisting of post mortem notes of deceased Bhavna (Ex.8), injury certificate of the appellant and her son Sandip issued by the Medical Officer, Maskati Charitable Hospital (Ex.11), panchnama of the scene of offence (Ex.5), inquest panchnama (Ex.6), complaint (Ex.21), dying declaration of the appellant recorded by the Executive Magistrate, etc.

4. After recording of evidence of prosecution witnesses was over, the learned Judge questioned the appellant generally on the case and recorded her statement under S. 313 of the Code of Criminal Procedure, 1973 (for short "the Code"). In her statement under S.313 of the Code, the appellant stated that she had not thrown her daughter Bhavna in river Tapi, nor had she jumped in river with her son Sandip. She explained that her son Sandip, daughter Bhavna and she herself had fallen in the river water accidentally, and as she knew swimming, she had saved her son Sandip. She asserted that she was physically fit and mentally sound. She further claimed that a false case was made out against her, and she had not jumped in river Tapi. She also stated that the personnel of the fire brigade had helped her in coming out of the river. She stressed that the executive Magistrate did not record her dying declaration, and her signature was obtained on a prepared statement. According to her, the statement which was noted down by the Executive Magistrate was never read over to her and therefore, she did not know the contents of the so called statement recorded by the Executive Magistrate. In her statement she further explained that the incident had taken place as the railing of the bridge was in a dilapidated condition as a result of which by accident, she, her daughter Bhavna and son Sandip had fallen in the river and inspite of her best efforts, she could not save her daughter Bhavna but as she knew

swimming she could save her son Sandip. She also clarified that she did not try to commit suicide by jumping in river Tapi and that she had not thrown her son and daughter in the river with an intention to cause their deaths. The appellant however, did not lead evidence in defence.

5. After taking into consideration the evidence led by the prosecution and hearing the parties, the learned Judge recorded the following conclusions :

(i) The oral evidence of witnesses and the medical evidence of Dr.Gordhanbhai Arjanbhai and the post mortem notes prove that Bhavna died a homicidal death.

(ii) The oral testimony of Dr.Kusumben Patel proves that the appellant confessed before her that she had thrown her son Sandip and daughter Bhavna in river Tapi and thereafter she had jumped in the river to commit suicide.

(iii) The above extra-judicial confession made by the appellant before Dr.Kusumben was voluntary and prior to her arrest.

(iv) The oral evidence of the personnel of Fire Brigade and Dr.Kusumben proves that the appellant alongwith her son and daughter had jumped in river Tapi.

(v) The dying declaration recorded by Executive Magistrate Rameshchandra Joshi is admissible in evidence as confession of the appellant.

(vi) (i) extra-judicial confession made by the appellant before Dr.Kusumben, (ii) the confessional statement recorded by the Executive Magistrate ; and (iii) the oral testimony of Ishwarbhai Narsingbhai, Sub-Officer of Fire Brigade, Surat Municipal Corporation, prove that -

(a) the appellant had with the intention of causing death of her daughter Bhavna, and with the intention of causing such bodily injury as the appellant knew to be likely to cause death of her daughter Bhavna, thrown her in river Tapi and therefore, offence under S.302 I.P.Code is established against her.

(b) the appellant with the intention to cause the death of her son had jumped in river Tapi with him and offence under S.307 is proved.

(c) the appellant had jumped in river Tapi to commit suicide and therefore, offence under S.309 I.P.Code is also made out against her.

6. In view of the above referred to conclusions, the learned Judge convicted the appellant under Ss.302, 307 and 309 of the I.P.Code and imposed the sentence which is referred to earlier, giving rise to the present appeal.

7. Mr.K.J.Shethna, the learned Counsel appearing for the appellant has taken us through the entire evidence on record and submitted that there is no direct evidence led by the prosecution which proves beyond doubt that the appellant, with the intention to cause death of deceased Bhavna had thrown her in the water of river Tapi and therefore, conviction of the appellant under S.302 I.P.Code deserves to be set aside. The learned Counsel pleaded that there is no direct evidence which proves that the appellant in an attempt to cause death of her son Sandip had thrown him in river Tapi and as a result, her conviction under S.307 I.P.Code also requires to be quashed. It was claimed by the learned Counsel for the appellant that there is no direct evidence led by the prosecution to prove that the appellant had jumped in river Tapi to commit suicide and thus no offence is made out against her under S.309 of I.P.Code. It was strenuously urged that the learned Judge has erred in treating the dying declaration recorded by the Executive Magistrate, as confession of the appellant, to bring home charge against the appellant as the Executive Magistrate had no power to record confessional statement in view of the provisions of S.164 of the Code and therefore, the appeal deserves to be accepted. It was also urged that the learned Judge has misread the evidence of Dr.Kusumben because the appellant had not made any extra-judicial confession before Dr.Kusumben. Lastly it was submitted by the learned Counsel that the approach of the learned Judge in convicting the appellant is perverse and illegal and therefore, the appeal should be allowed.

8. Mr.M.A.Bukhari, the learned APP, submitted that the evidence of Mr.Ishwarbhai Narsingbhai Patel, PW 13,

Ex.25, Sub-Officer of Fire Brigade, Surat Municipal Corporation, the statement made by the appellant before the Executive Magistrate and the extra-judicial confession made by the appellant before Dr.Kusumben prove beyond reasonable doubt the guilt of the appellant and appeal should be dismissed. He also submitted that the statement recorded by the Executive Magistrate was admissible in evidence and therefore, it was rightly relied on by the learned Judge. According to Mr.Bukhari, cogent and convincing reasons have been given by the learned Judge in convicting the appellant, and in absence of good ground, the same should not be interfered with by this court in appeal.

9. In order to prove that Bhavna died a homicidal death, the prosecution examined Dr.Gordhanbhai Arjanbhai, PW 1, Ex.7, who was at the relevant time discharging duties as Medical Officer in New Civil Hospital, Surat. He stated that on 9.6.1987, at about 3.00 p.m., Police Constable Ishwarbhai Khannabhai of Rander Police Station brought the dead body of one Bhavnaben for performing post mortem. His evidence shows that he started the post mortem examination at 3.00 p.m. and completed it at 4.00 p.m. Dr.Gordhanbhai has produced the post mortem notes at Ex.8. In the opinion of Dr.Gordhanbhai, Bhavna died as a result of "Asphyxia due to drowning received on her body". In order to prove that Bhavna died a homicidal death, the prosecution examined the personnel of fire brigade, Surat. The sum and substance of the oral evidence led by the prosecution is that the fire brigade personnel had seen the appellant and her son Sandip falling in river Tapi. There is no direct evidence led by the prosecution on the record of this case which proves that the appellant with the intention to cause death of Bhavna had thrown her in the river.

10. In order to bring home the charge against the appellant, the prosecution relied upon the evidence of following witnesses :

1. PW 4 Ex.12 Jayantibhai Maganbhai Patel,
2. PW 5 Ex.13 Ishwarbhai Gurjibhai Patel,
3. PW 6 Ex.14 Suresh Dagdu,
4. PW 7 Ex.15 Premvadan Chhaganlal,
5. PW 10 Ex.18 Harishbhai Maganbhai Patel,

and 6. PW 13 Ex.25 Ishwarbhai Narsingbhai Patel.

However, a bare glance at the oral testimony of Jayantibhai Maganbhai Patel (PW 4), Ishwarbhai Girjibhai Patel (PW 5), Suresh Dagdu (PW 6) and

Premvadan Chhaganlal (PW 7) makes it abundantly clear that they have not supported the prosecution and therefore, with the permission of the court, the prosecution treated them as hostile witnesses. Those witnesses were contradicted with their earlier statements. The law regarding appreciation of evidence of hostile witness is that it can be relied upon if it is corroborated by other reliable independent evidence on record. In this case, we find that there is no reliable independent evidence indicating that the appellant with an intention to cause death of her daughter Bhavna threw her in river water and therefore, the evidence of hostile witnesses is of no help to the prosecution.

11. PW 13, Ex.25 Ishwarbhai Narsingbhai Patel, who was at the relevant time, Sub-Officer of Fire Brigade, Surat, deposed in his sworn testimony that he was in the water of Tapi river to search one dead body and at that time he saw the appellant falling down in the river alongwith her son and he caught hold of the appellant and her son, and brought them out of the river and saved their lives. From his evidence it is clear that he never witnessed the appellant throwing her daughter in the river. In our opinion, the evidence of this witness does not prove that the appellant had thrown her daughter Bhavna in the river with the intention to cause her death. Harishbhai Maganbhai Patel, PW 10, Ex. 18 - the husband of the appellant in his evidence before the court deposed that the appellant had thrown his daughter Bhavna in the river but he did not attend her funeral ceremony. Neither he went to Maskati Hospital to enquire about the condition of his son nor of the appellant. He stated that he had no quarrel with the appellant and their marital relations were good. The evidence of this witness does not help the version of the prosecution that as the appellant was treated with cruelty by her husband and in-laws, and as her husband did not like her, she tried to commit suicide and in that attempt caused intentional death of her daughter Bhavna because he is not an eye-witness to the incident. In our opinion, the oral evidence of Harishbhai Maganbhai PW 10, also does not prove that the appellant had the intention to cause the death of her son and daughter. In the case of murder, where intention is one of the essential ingredients of offence, it is always necessary that there should be a definite finding as to whether necessary guilty intention is present or not. Intention to commit murder must be proved and cannot be assumed as the

basis on one's conclusion. The inference of intention or otherwise has to be drawn after consideration of the circumstances which preceded, attended and followed the crime.

The prosecution has examined Dr.Kusumben Bhagubhai Patel, PW 3 Ex.10, who was at the relevant time discharging duties as Medical Officer, Maskati Hospital. She stated in her sworn testimony that on 7.6.1987 at about 10.20 a.m. the appellant was brought to her for treatment. According to her, she examined the appellant and on being questioned about the incident, the appellant gave the history that she alongwith her daughter and son had fallen in river Tapi. The appellant never made a confession before Dr.Kusumben to the effect that she had thrown her daughter Bhavna and son Sandip in river Tapi with an intention to cause their deaths. It is pertinent to note that it was never stated by the appellant to Dr.Kusumben that she had jumped in the river to commit suicide. To the Doctor, the appellant only stated that she alongwith her son and daughter had fallen in the river. This version of the appellant is consistent with the explanation given by her in her statement under S.313 of the Code. While appreciating the evidence led by the prosecution the court is under an obligation and duty bound to take into consideration the defence version of the accused also. As stated earlier, the version given by the appellant before Dr.Kusumben is consistent with her explanation offered under S.313 of the Code that as the railing of the bridge was in dilapidated condition, she, her son and daughter had fallen down in the river accidentally. The learned Judge has erred in treating the history of incident narrated by the appellant before Dr.Kusumben as extra-judicial confession made by the appellant. The statement made by the appellant could not have been treated as a confession. A confession in criminal law means an admission of certain facts which constitute an offence committed by a person charged with the offence which is the subject matter of confession. A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession. Judged in the light of these principles, statement made by the appellant before Dr.Kusumben can never be construed as her confession of guilt. She has neither admitted in terms the offences stated to have been committed by her nor admitted substantially the facts which constitute the offences.

The learned Judge has totally misconstrued the statement made by the appellant before the doctor as well as history noted by the medical officer while recording finding of guilt against the appellant. Under the circumstances, the conclusion recorded by the learned Judge that extra-judicial confession made by the appellant before the doctor proves her guilt is liable to be quashed and is hereby set aside. In the injury certificate issued by Dr.Kusumben, which is produced at Ex.11 on the record of the case, it is mentioned that it was a case of drowning in Tapi river with one girl and one boy. It is true that Bhavna died as a result of drowning in river Tapi. But from that alone, it cannot be said that the appellant, with the intention to cause her death, had thrown her in the river water.

12. The learned Judge, in convicting the appellant for the alleged offences, relied on the dying declaration recorded by Executive Magistrate Mr.Rameshchandra Pranshanker Joshi, PW 14, Ex.26. In her dying declaration the appellant stated that she had thrown her daughter Bhavna in the river and had thereafter jumped in the river with her son Sandip. We fail to understand as to how the statement made by the appellant as an accused could have been relied onby the learned Judge as her confession of guilt. The statement which was recorded was purported to be recorded as dying declaration. However, it is well settled that when the person who has made the statement, may be in expectation of death, survives, then the statement is not his dying declaration and accordingly is not admissible in evidence under S.32 of the Indian Evidence Act. Where the maker of the statement is not only alive, but has deposed in the case, his statement is not admissible under S.32 of the Evidence Act, but is admissible under S.157 of the Evidence Act as former statement made by him, in order to corroborate his testimony before the court (See: Maqsoodan & Ors. vs. State of U.P., AIR 1983 S.C., 126). Though the appellant as an accused was a competent witness, she has not examined herself in this case and therefore, the statement recorded by the Executive Magistrate would not be admissible under S.157 of the Evidence Act also. The question which arises is whether the statement of the appellant recorded by the Executive Magistrate is admissible in evidence as her confession ?

Section 164 of the Code prescribes the manner and method in which confessional statement is to be

recorded. The relevant part of the said Sec.164 is excerpted below :

" 164. Recording of confessions and statements.

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial ;

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) x x x x x x x x x x

to

(6) x x x x x x x x x x x "

Thus, as per the provision of S.164 of the Code, confession or statement in the course of an investigation can be recorded either by a Metropolitan Magistrate or by a Judicial Magistrate. The Executive Magistrate was not empowered to record confessional statement of the appellant as he was neither a Metropolitan Magistrate nor a Judicial Magistrate. Furthermore, when investigation has already commenced, the confessional statement can be recorded by the Magistrate empowered by S.164 of the Code, only in the manner prescribed in the said section. In view of this legal position, the issue whether the learned Addl. Sessions Judge was right in relying on the alleged statement recorded by the Executive Magistrate and treating it as the confessional statement of the appellant for convicting her deserves to be considered. As per the evidence of Investigating Officer, Dy. Supdt. of Police Mr.Antani, the offence was registered against the appellant on 7.6.1987 at the Rander Police Station as Crime Register No.I-158/87, and the investigation had already commenced. Therefore, in view of S.164 of the Code, the confessional statement could have been recorded only by the Magistrate empowered under that section. Admittedly, the Executive Magistrate was not empowered to record the confessional statement of the appellant. In the case

of STATE OF UTTAR PRADESH vs. SINGHARA SINGH AND OTHERS, AIR 1964 SC 358, seven persons including the three respondents were prosecuted for murder of one Raja Ram. The Sessions Court acquitted four accused but convicted one respondent under S. 302 I.P.Code and two others under S. 302 read with Ss.120B, 109 and 114 I.P.Code and sentenced two respondents to death. The respondents appealed to the High Court of Allahabad, and the State from the acquittal. The High Court had also before it the usual reference for confirmation of the sentences of death. The High Court allowed the appeals of the respondents, dismissed the appeal of the State and rejected the reference. Acquittal of respondents by High Court was challenged before the Supreme Court by the State. The State relied on confession of guilt made by the respondents to learned Second Class Magistrate, under S.164 of the Code. The Supreme Court while examining question of admissibility of confession made before the Second Class Magistrate, referred to decision of Judicial Committee in NAZIR AHMED vs. KING EMPEROR, AIR 1936 P.C. 253(2), wherein it is held that when a Magistrate of the First Class records a confession under S.164, but does not follow the procedure laid down in that section, oral evidence of the confession is inadmissible. The Supreme Court also examined the scope of S. 164 of the Code in detail and the rule adopted in TAYLOR vs. TAYLOR (1876) 1 Ch D, 426 to the effect that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. While dismissing the State appeal, the Supreme Court has observed as under in para 8 of the judgment :

" The rule adopted in Taylor v. Taylor (1876) 1 Ch D 426 is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in S. 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other

means was permissible, the whole provision of S. 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on magistrates the power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confessions made to him."

It was argued that NAZIR AHMED's case was wrongly decided and in any view of the matter principle laid down therein should not be applied as Judicial Committee had no occasion to deal with a case where a magistrate of the second class not specially empowered had purported to record a confession under S. 164 of the Code. The Supreme Court has held that NAZIR AHMED's case is correctly decided. The contention that principle laid down therein should not be applied as Judicial Committee had no occasion to deal with a case where a magistrate of the second class not specially empowered had purported to record a confession under S. 164 of the Code is negatived in para 15 of the judgment, as under:

" It is true that the Judicial Committee did not have to deal with a case like the present one where a magistrate of the second class not specially empowered and purported to record a confession under S. 164. The principle applied in that decision would however equally prevent such a magistrate from giving oral evidence of the confession. When a statute confers a power on certain judicial officers, that power can obviously be exercised only by those officers. No other officer can exercise that power, for it has not been given to him. Now the power has been conferred by S. 164 on certain magistrates of higher classes. Obviously, it was not intended to confer the power on magistrates of lower classes. If, therefore, a proper construction of S. 164, as we have held, is that a magistrate of a higher class is prevented from giving oral evidence of a confession made to him because thereby the safeguards created for the benefit of an accused person by S. 164 would be rendered nugatory, it would be an unnatural construction of the section to hold that these safeguards were not thought necessary and could be ignored, where the confession had been made to a magistrate of a lower class and

that such a magistrate was, therefore, free to give oral evidence of the confession made to him. We cannot put an interpretation on S. 164 which produces the anomaly that while it is not possible for higher class magistrates to practically abrogate the safeguards created in S. 164 for the benefit of an accused person, it is open to a lower class magistrate to do so. We, therefore, think that the decision in Nazir Ahmed's case, 63 Ind App 372: (AIR 1936 PC 253(2) also covers the case in hand and that on the principle there applied, here too oral evidence given by Mr.Dixit of the confession made to him must be held inadmissible."

13. In the case of RAO SHIV BAHADUR SINGH AND ANOTHER vs. STATE OF VINDH PRADESH, AIR 1954, SC 322, the appellant was tried for an offence under S.161 of the I.P.Code. In order to bring home the charge to the accused, prosecution relied on the confession made by the appellant before the Additional District Magistrate. The question arose before the Supreme Court whether the confession made before the Additional District Magistrate was admissible in evidence. Dealing with that question, the Supreme Court held that the confession is inadmissible in evidence, and observed as under :-

" Section 162 of the Criminal Procedure Code rendered the statement made by the Appellant No.1 to the police officers inadmissible. The investigation into the offence had already started immediately on the F.I.R. being registered by the police authorities and Pandit Dhanraj himself admitted in his evidence that the investigation into the offence had thus started before the raid actually took place. The statements made by the Appellant No.1 to Shanti Lal Ahuja, the Additional District Magistrate was therefore made after the investigation had started and during the investigation of the offence and was therefore hit by Section 164 of the Criminal Procedure Code.

It was urged on behalf of the Respondent that this statement was not a confessional statement and was therefore not hit by Section 164 and Shanti Lal Ahuja, the Additional District Magistrate, could therefore depose to such

> statement even though the same was not recorded as required by the provisions of Section 164 of the Criminal Procedure Code. There is authority however for the proposition that once the investigation had started any non-confessional statement made by the accused also required to be recorded in the manner indicated in that section and if no such record had been made by the Magistrate, the Magistrate would not be competent to give oral evidence of such statement having been made by the accused. [See-'Nazir Ahmad vs. King Emperor', AIR 1936 PC 253 (2), and - 'Legal Remembrancer, Bengal v. Lalit Mohan Singh Roy', AIR 1922 Cal 342, followed in - 'Abdul Rahim v. Emperor', AIR 1925 Cal 926, and - 'Karu Mansukh v. Emperor', AIR 1937 Nag 254]. The statement made by the Appellant No.1 therefore to Shanti Lal Ahuja, the Additional District Magistrate not having been recorded by him in accordance with the provisions of Section 164 was inadmissible in evidence and couldnot be proved orally by him. If therefore, the statement was thus eliminated from evidence, nothing remained so far as the witnesses Nagindas and Pannalal on the one hand and the police witnesses as well as Shanti Lal Ahuja, the Additional District Magistrate on the other hand were concerned which could bring the guilt home to the Appellant No.1. "

14. The principle of law which emerges from the above quoted decisions of the Supreme Court is that a confession or statement in the course of investigation can be recorded only by empowered Magistrates and that too in prescribed manner and if confession or statement is not recorded by empowered Magistrate in prescribed manner, it has to be ignored from consideration. It is well settled legal principle which hardly requires to be emphasised that where a statement is made by an accused and recorded by Executive Magistrate as dying declaration, wherein the accused incriminates himself by stating that he attacked the deceased and then he inflicted wounds on himself, such a statement becomes inadmissible in evidence under S.32 of the Indian Evidence Act, 1872, by reason of the accused surviving. As held earlier, such a statement cannot be admitted in evidence as confession, if it is found that the Magistrate who recorded it was not empowered to record it under S.164 of the Code, or if the Magistrate was so empowered, failed to comply with the provision of S.164

of the Code. The net result is that neither the oral evidence of the Executive Magistrate to prove the confession of the appellant nor the statement of the appellant-accused recorded by the Executive Magistrate is admissible in evidence either under S.32 or under S.157 of the Indian Evidence Act, or under S.164 of the Code, and therefore, the same will have to be excluded and ignored from consideration.

15. The learned Addl. Sessions Judge has completely misinterpreted the provision of S.164 of the Code and placed reliance on the statement recorded by the Executive Magistrate. As discussed earlier. no extra-judicial confession was made by the appellant before Dr.Kusumben, and therefore, the learned Judge has wrongly placed reliance on that piece of evidence in convicting the appellant. The oral evidence also does not connect the appellant with the offences in question. The prosecution has thus failed to prove that deceased Bhavna died a homicidal death. The only thing proved by the prosecution is that deceased Bhavna fell in the river and was drowned. A death may be natural, homicidal, suicidal or accidental. It is well settled that establishment of homicidal death is sine qua non before an accused can be convicted under S.302 of I.P.Code. The prosecution has failed to prove that death of Bhavna was caused by the act of the appellant. At the best, the prosecution case would indicate that deceased Bhavna died an accidental death. As the prosecution has failed to prove that deceased Bhavna met with homicidal death, conviction of the appellant under S.302 of I.P.code is liable to be set aside. Similarly, the prosecution evidence does not prove that the appellant jumped in the river with her son Sandip, with intention to cause death of her son. Therefore, conviction of the appellant under S.307 of I.P.Code also will have to be set aside. Again, there is no evidence worth the name that the appellant attempted to commit suicide by jumping in river Tapi. Under the circumstances, her conviction under S.309 of I.P.code is also illegal and liable to be quashed. On overall view of the matter, we are of the opinion that the reasoning given and the conclusion arrived at by the learned Addl.Sessions Judge for convicting the appellant are patently wrong, illegal, perverse and against the settled legal principles. Therefore, the conviction of the appellant is bad and deserves to be set aside, and accordingly, the appeal will have to be accepted.

16. For the foregoing reasons, the appeal succeeds.

Judgement and order dated July 19, 1988, passed by the learned Additional Sessions Judge, Surat, in Sessions Case No. 137/87, convicting the appellant under Ss.302, 207 and 309 of the I.P.Code, and sentencing her to R.I. for life for the offence under S.302, are hereby quashed and set aside. The appellant is acquitted of the offences with which she was charged. The appellant is on bail. The bail bonds are therefore ordered to be cancelled.

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abraham*